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In the Supreme Court of the United States

OCTOBER TERM, 1989

ATLANTIC RICHFIELD COMPANY, PETITIONER

v.

USA PETROLEUM COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a firm suffers antitrust injury when it loses sales to competitors that are charging nonpredatory prices pursuant to a vertical, maximum price-fixing scheme.

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INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission enforce the federal antitrust laws. This case presents the question whether a firm has suffered antitrust injury as a result of nonpredatory price competition from companies that have a vertical agreement to maintain a maximum resale price. The United States has an interest in ensuring that this question is resolved in a manner that advances, rather than impedes, the procompetition objectives of the antitrust laws.

STATEMENT

1. Petitioner Atlantic Richfield Company (Arco) is a vertically integrated oil company whose operations include the marketing of Arco-brand gasoline in the western

United States. Arco sells to customers through its own stations and through independently owned stations that resell gasoline under the Arco brand name. Respondent USA Petroleum Company (USA) is an "independent" marketer of gasoline. USA, like other independents, buys gasoline from major petroleum companies for resale under its own brand name. USA's retail outlets are high volume, low overhead "discount" stations that typically charge less for equivalent quality gasoline than stations selling under a major brand name.[1] J.A. 11-16, 58-59.

In early 1982, Arco adopted a new marketing strategy to become more price-competitive with USA and other independents. Arco's strategy was to reduce its dealers' costs (*e.g.*, by eliminating credit card sales) and to encourage them to meet or beat the prices of independent stations. To accomplish that objective, Arco ga~~ve its~~ dealers such incentives as "temporary competitive allowances" and "temporary volume allowances." Arco's strategy resulted in increased sales and market share. See Pet. 3.

In early 1983, USA filed a complaint against Arco in United States District Court for the Central District of California, alleging, *inter alia,* that Arco's conduct violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.[2]

[1] The primary distinction between a "major" and an "independent" oil company is that " '[a] major oil company is usually integrated in that it operates on the four functional levels of production, transportation, refining, and marketing. Generally, a non-major does not own its refinery, or if it does, the refinery is usually small. The non-major usually owns and operates its' " own stations. *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26, 30 n.1 (5th Cir.), cert. denied, 409 U.S. 1077 (1972) (citation omitted). USA alleged that Arco is one of the "majors", which it stated were "a small number of fully integrated enterprises which are among the largest industrial corporations in the United States and the world." J.A. 13 ¶ 9.

[2] USA also alleged violations of the Robinson-Patman Anti-Discrimination Act, 15 U.S.C. 13(a), and the Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 *et seq.* (West 1987). Those claims are pending before the district court.

USA's amended complaint alleged that "Arco and its co-conspirators have organized a resale price maintenance scheme, as a direct result of which competition that would otherwise exist among Arco-branded dealers has been eliminated by agreement, and the retail price of Arco-branded gasoline has been fixed, stabilized and maintained at artificially low and uncompetitive levels." J.A. 17 ¶¶ 27. Count one charged that the various incentives Arco offered to its dealers, together with "severe and predatory price cuts," were intended to drive independents out of the market in violation of Section 1 of the Sherman Act. J.A. 17-18 ¶¶ 27-29. Count two charged that Arco had engaged in an attempt to monopolize in violation of Section 2 of the Sherman Act. J.A. 21-23 ¶¶ 42-48.

In March and June 1986, Arco moved for summary judgment on the Sherman Act claims. For purposes of its motions, Arco assumed the existence of a maximum resale price fixing agreement between it and the dealers that sold Arco gasoline. Arco contended, however, that USA had not suffered the "antitrust injury" needed to pursue its Section 1 claim. Arco argued that, as a competitor, USA would suffer antitrust injury from the alleged vertical maximum price agreement only if the prices the Arco dealers charged under the agreement were predatory.[3] Arco further maintained that, as a matter of law, the record would not support a finding of predatory pricing.[4] C.A. E.R. 83, at 18-19; *id.* Exh. 1, at 35-42.

[3] Arco stated that "a 'predatory' price is one which creates the dangerous probability that the defendant(s) may achieve a monopoly with the concomitant ability to raise prices in the future." C.A. E.R. 83, at 18. See also J.A. 67-68.

[4] Arco argued that USA could not prevail on its Section 1 claim "for essentially the same reason that it cannot prevail on its claim under

The district court dismissed the Section 1 claim. The court said: "Even assuming that the plaintiff can establish a vertical conspiracy to maintain low prices, the plaintiff cannot satisfy the 'antitrust injury' requirement of the Clayton Act § 4, without showing such prices to be predatory." Pet. App. 3b. The court then concluded that USA could make no showing of predatory pricing because, given Arco's market share and other characteristics of the relevant market, Arco was in no position to exercise market power.[5] Pet. App. 4b.

2. a. A divided panel of the Ninth Circuit reversed. The court framed the issue before it as "whether a com-

Section 2 of the Sherman Act." C.A. E.R. 83, Exh. 1 at 35. With respect to USA's Section 2 claim, Arco contended that the undisputed sales and market share evidence established that there was no "dangerous probability" that it could monopolize any relevant market. The court had earlier granted Arco's motion to dismiss USA's Section 2 claim as originally pleaded, reasoning that the complaint contained the "undisputed allegation that the end result of Arco's misconduct would be a market controlled by all of the major oil companies," and, therefore, the complaint "on its face, affirmatively alleges facts that indicate[ ] that no 'dangerous probability of success exists' " that Arco would obtain a monopoly. *USA Petroleum Co.* v. *Atlantic Richfield Co.*, 577 F. Supp. 1296, 1304 (C.D. Cal. 1983). USA subsequently amended its Section 2 claim, but, shortly after Arco filed its summary judgment motion, USA voluntarily dismissed that claim with prejudice. J.A. 78-79.

[5] Specifically, the court found that "major-brand and minor-brand gasoline retailers compete with each other in the same market" and that the 17% "combined share of the relevant market held by [Arco and its dealers] is clearly insufficient to present a dangerous probability of monopolization." Pet. App. 2b-3b. The court also found that, even if it were to "assume[ ] *arguendo* that there exists a separate 'discount' gasoline market, other major oil companies may enter this market, as USA contends that [Arco] did in April 1982, and the possibility of such entry effectively prevents" Arco and its dealers from exercising market power. *Id.* at 3b.

petitor's injuries resulting from vertical, non-predatory, maximum price fixing fall within the category of 'antitrust injury.' " Pet. App. 3a. The court noted that under this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), a plaintiff " 'must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.' " Pet. App. 4a. Applying its understanding of *Brunswick*, the court concluded that USA had sufficiently alleged antitrust injury.

The court began by recalling that under this Court's decisions, any form of price fixing violates Congress's intent "that market forces alone determine what goods and services are offered, at what price these goods and services are sold, and whether particular sellers succeed or fail." Pet. App. 12a (citing *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); and *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982)). Based on this observation, the court believed that the key inquiry in determining whether USA suffered "antitrust injury" was whether USA's "injuries resulted from a disruption of competition in [USA's] market caused by [Arco's] antitrust violations." Pet. App. 13a. The court concluded that this requirement was satisfied. It stated: "USA's claimed injuries were the direct result, and, indeed, * * * the intended objective, of ARCO's price-fixing scheme. According to USA, the purpose of ARCO's price-fixing scheme is to disrupt the market of retail gasoline sales, and that disruption is the source of USA's injuries." *Ibid.*

The court rejected the need to explain how a maximum resale price-fixing agreement caused "antitrust injury" to a competitor, concluding instead that "the proper question

is not what type of injuries a rule against maximum resale price maintenance was meant to prevent, but what kind of injuries rules against price fixing were meant to prevent." Pet. App. 14a. The court simply noted that, in general, price fixing interferes with competition because it "distorts the markets, and harms all the participants." *Ibid.* The court added that even if it were to consider maximum resale price fixing in isolation, it would reach the same result in light of the potential "long-term consequences of that practice." *Id.* at 15a.

The court also rejected Arco's argument, based on *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), that USA's injury resulted from an increase, rather than a decrease, in competition. The court characterized both *Cargill* and *Brunswick* as cases involving an "attenuated or indirect" connection between the antitrust violation and the injury because the injuries resulted only from "pricing practices" that were themselves legal. By contrast, the court noted, USA's injury "result[s] directly from pricing practices that defendants admit (for the purposes of this appeal) are forbidden by the antitrust laws and are therefore illegal." Pet. App. 15a-16a. The court concluded that the "failure of * * * firms, when due to illegal pricing practices, must be characterized as a 'lessen[ing] [of] competition', not an increase in competition." *Id.* at 19a.

b. Judge Alarcon dissented. In his view, *Brunswick* required the court to evaluate USA's injury in light of the anticompetitive effects of the specific violation alleged because "[t]he anticompetitive effects will be different depending on the type of price fixing agreement" involved. He noted that horizontal price-fixing agreements are condemned because they "create market power that did not previously exist" and that the "effect of minimum price fixing, whether horizontal or vertical, is generally higher prices." By contrast, Judge Alarcon observed, maximum

price fixing is not thought "as destructive as minimum price fixing principally because it generally results in lower prices to consumers." Pet. App. 28a-29a. He also noted Professor Areeda's view that vertically imposed, maximum price fixing agreements—which affect only one supplier's dealers—are " 'virtually never anticompetitive.' " Pet. App. 32a (citing P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 335.2h n.56 (Supp. 1987)).

Accordingly, Judge Alarcon concluded that to the extent that USA was injured by Arco's low but nonpredatory prices, it would suffer no antitrust injury. Whether or not Arco's own dealers might be able legitimately to claim that their " 'freedom' to set prices" had been impaired, it was, in his view, implausible that USA was " 'forced' * * * to match ARCO's prices when most of the market had set prices above those" of Arco. Pet. App. 33a & n.7. The majority, he argued, had erred in focusing on whether "ARCO's alleged *anticompetitive acts* were of the type the antitrust laws were intended to prevent as opposed to whether its *injury* was of the type the antitrust laws were intended to prevent." *Id.* at 37a. The alleged violation could injure USA only by "lower[ing] prices to consumers," and this type of "injury" raises concerns under the antitrust laws only if prices are so low as to be predatory. *Id.* at 36a. Accordingly, Judge Alarcon concluded that USA failed to demonstrate antitrust injury to itself. *Id.* at 39a.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that a plaintiff who competes with the defendant's dealers suffers antitrust injury when a maximum resale price agreement with those dealers results in nonpredatory price competition. By its holding, the court has achieved the ironic result of allowing a competitor to seek treble damages because of

lost sales due to aggressive, but nonpredatory, pricing by a rival. This holding is inconsistent with decisions of this Court and with the purposes of the antitrust laws.

A private plaintiff does not adequately state a claim for relief under the antitrust laws simply by alleging injury as a result of an antitrust violation; the plaintiff must also establish "antitrust injury" to itself. That showing must "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The court of appeals' holding is incompatible with this principle. In cases involving per se violations, the court's treatment of antitrust injury would effectively dispense with any analysis of the "anticompetitive effect" of the violation and would authorize recovery whenever the plaintiff could show injury through its participation in a market "disrupted" by that violation. Such an analysis ignores the fact that when the pricing of a firm is not predatory, the business lost by its rivals cannot be viewed as an "anticompetitive" consequence of the claimed violation. *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).

The court of appeals' holding is also wrong because it is based on the mistaken premise that the antitrust laws are intended to provide a private remedy for any and all market "distortions", whether or not they are related to the pro-consumer goal of protecting competition. While several reasons have been advanced for deeming vertical, maximum price-fixing agreements to be illegal per se, see *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), it has never been a purpose of that rule to protect competitors from lower prices. Reduced, but nonpredatory, prices have the same effect on a competitor as the price competition that the antitrust laws are designed to foster.

Affording rivals the opportunity to challenge conduct that injures them only through increased competition is unnecessary to deter vertical maximum price fixing. To the extent such conduct visits on distributors the anticompetitive consequences described by this Court in *Albrecht*, those distributors have adequate incentive to sue. Recognizing antitrust injury in this case, however, would only encourage competitors to argue that their rivals' fully lawful vertical nonprice agreements are actually disguises for unlawful price restraints. The availability of that sort of claim would undercut this Court's efforts to "assure that the market-freeing effect of [rule of reason analysis of nonprice vertical restraints] is not frustrated by related legal rules." *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 108 S. Ct. 1515, 1520 (1988).

ARGUMENT

COMPETITORS DO NOT SUFFER ANTITRUST INJURY AS A RESULT OF NONPREDATORY PRICE COMPETITION UNDERTAKEN PURSUANT TO A MAXIMUM RESALE PRICE AGREEMENT.

A. A Plaintiff Suffers Antitrust Injury Only If Its Injury Results From An Anticompetitive Effect Of the Violation Alleged

A private antitrust plaintiff must allege not only that it has been injured as a result of an antitrust violation, but also that its injury is one that the antitrust laws were designed to forestall. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977); *Blue Shield* v. *McCready*, 457 U.S. 465, 483 & n.19 (1982); *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 539-540 (1983). In *Brunswick*, which established the requirement of antitrust injury, the Court squarely rejected the notion that every

"dislocation[ ] caused by" an antitrust violation constitutes antitrust injury compensable under Section 4 of the Clayton Act, 15 U.S.C. 15. *Brunswick* involved a challenge by bowling center owners to a merger of rival bowling centers. The plaintiffs claimed that but for the illegal merger, their rivals would have gone out of business, thereby allowing the plaintiffs to increase their market share and profits. This Court concluded that a mere causal link between the plaintiffs' injury and the violation, standing alone, was inadequate. 429 U.S. at 487. Recognizing that every antitrust violation has the "potential for producing economic readjustments that adversely affect some persons," *ibid.*, the Court held that private antitrust damage plaintiffs must satisfy the additional element of showing "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id.* at 489. Explaining that the antitrust laws were enacted " 'for the protection of *competition,* not *competitors*,'" *id.* at 488 (quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962), the Court stressed that it would be "inimical to the purposes of the[ ] [antitrust] laws" to award damages for profits lost due to competition. 429 U.S. at 488.

The Court extended and reinforced the concept of antitrust injury in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). There, a firm proceeding under Section 16 of the Clayton Act, 15 U.S.C. 21, sought to enjoin a merger of its rivals. It alleged that it might lose profits as a result of increased price competition made possible by efficiencies resulting from the merger. The Court held that, even assuming the merger was unlawful because of the threat to competition in a relevant market, allegations of possible price competition at "some level at or slightly above [the merged company's] costs" did not establish a

threat of *antitrust* injury to a firm competing in that market. 479 U.S. at 114-117. The Court explained that nonpredatory price competition, even if undertaken with the goal of increasing market share, did not threaten antitrust injury to a competitor. "To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect render illegal any decision by a firm to cut prices in order to increase market share." *Id.* at 116. See also *Phototron Corp.* v. *Eastman Kodak Co.*, 842 F.2d 95, 99-100 (5th Cir.), cert. denied, 108 S. Ct. 1996 (1988). In contrast, the Court recognized that if there were proof that the merged company "would attempt to drive [a competitor] out of business by engaging in sustained predatory pricing," that claim would stand on a different footing. Because "predatory pricing has as its aim the elimination of competition," it is a practice that can inflict antitrust injury. 479 U.S. at 117-118.[6]

The court of appeals in this case believed that because respondent alleged a price-fixing agreement, it was unnecessary to determine whether respondent's injury flowed from anticompetitive effects of the violation. All forms of price fixing, in the court's view, are illegal per se not because of the particular threats they pose to competition, but because they disrupt or distort the functioning of a competitive market in a general sense. Thus, the court concluded, a firm faced with intensified competition in a market "disrupted" by any price fixing agreement suffers

[6] The Court in *Cargill* declined to formulate a precise measure of "predatory pricing," but accepted for purposes of its opinion a definition of "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." 479 U.S. at 117. We believe that this description accurately captures the conceptual underpinning of a definition of predatory pricing. Cf. *id.* at 117 n.12; *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 584-585 nn.8-9 (1986).

antitrust injury, even if the competitor's pricing is not predatory. Pet. App. 11a-13a.

In ignoring the nature of the price competition that a firm faces, the court of appeals misunderstood the inquiry mandated by *Brunswick* and *Cargill*. This Court has been at pains to emphasize that increased, vigorous competition does not itself constitute antitrust injury to a competitor. Rather, antitrust injury arises only when the competitor is adversely affected by the anticompetitive consequences of the practices complained of. In the case of pricing practices, only predatory pricing has the requisite anticompetitive effect.[7] *Cargill*, 479 U.S. at 117-118; *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Brunswick*, 429 U.S. at 489 n.14.

[7] Although the question is an important one, this case does not present an appropriate opportunity for the Court to address the question of the precise showing needed to demonstrate that petitioner's prices were "predatory." The court of appeals held that regardless of the benchmark for determining whether pricing is predatory, no such showing would be required. See Pet. App. 3a. Cf. *Cargill*, 479 U.S. at 117-118 n.12; *Matsushita*, 475 U.S. at 589. That holding would be incorrect no matter what specific standard was used to establish predatory pricing. We note, moreover, that respondent and petitioner apparently never developed a record on the cost issues that would be needed to demonstrate (or rebut) predatory pricing. It is true that respondent's amended complaint included general allegations that Arco had organized a vertical price fixing scheme with the effect of fixing prices of Arco gasoline at levels that were "artificially low and uncompetitive," "severe and predatory," and "below cost." J.A. 17-18 ¶¶ 27-29. In a subsequent pleading, however, respondent identified as a "genuine issue[] of fact" on the Section 1 claim the question whether prices were fixed "at artificially low levels," but made no reference to predatory pricing or to below-cost pricing. J.A. 78. Moreover, respondent informed the court of appeals that, because it had dismissed its Section 2 claim, it had "offered no proof on predatory pricing." Resp. C.A. Br. 6. Accordingly, the only question presented in this case is whether the alleged vertical, maximum price-fixing agreement caused respondent antitrust injury to the extent that it resulted in petitioner's dealers charging lower, but nonpredatory prices. See Pet. i.

The court of appeals purported to distinguish *Brunswick* and *Cargill* on the basis that those cases turned on an "attenuated or indirect" relationship between the alleged violation and the plaintiff's injury. Pet. App. 15a-16a. In neither case, however, did the Court state or imply that the injuries were too "attenuated" or "indirect" to justify the plaintiff's claim of antitrust injury. In fact, in each case the plaintiff's injury was alleged to flow directly as a consequence of an alleged antitrust violation (a merger).[8] The court of appeals also found *Cargill* not applicable here because the "pricing practices" that allegedly would have resulted from the illegal merger were not in themselves illegal or anticompetitive. Pet. App. 15a. But in this case as well, only the vertical agreement to fix maximum prices—

[8] Indeed, the relationship between the alleged violation and the injury in *Brunswick* could hardly be called "attenuated." The plaintiffs claimed that the acquisitions were unlawful because they "brought a 'deep pocket' parent into a market of 'pygmies' " (429 U.S. at 487) and that this "deep pocket" injured them by allowing the acquired bowling centers to remain in business, in competition with the plaintiff. Likewise, the merger in *Cargill* was held unlawful and enjoined by the lower courts, at least in part, because it would have provided the acquiring party with multi-plant efficiencies, thus permitting it to reduce the price of its final product (beef) while "bidding up" the price of its primary input (cattle), and subjecting the plaintiff and other producers in the market to a "price-cost squeeze." 479 U.S. at 108. The lower courts held that the same feature that made the merger unlawful—the threat of a "cost-price squeeze"—would also cause the plaintiff injury. *Ibid.* Thus, contrary to the court of appeals' analysis in this case, the flaw of the plaintiff's case in *Brunswick* and *Cargill* was not one of indirectness or attenuation of injury, but of a lack of the type of injury the antitrust laws are designed to prevent. Compare *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 540-541 & n.46 (1983) (discussing "indirect" and "remote" injury).

like the merger in *Cargill*—is illegal. Nonpredatory prices are not illegal in themselves, nor are they an *anticompetitive* consequence to a competitor. Thus, such prices do not inflict antitrust injury on that competitor simply on the theory that different prices might have prevailed in the absence of an antitrust violation.[9]

Nor does the fact that vertical, maximum price-fixing agreements are deemed illegal per se justify dispensing with the requirement that an antitrust plaintiff's injury flow from the anticompetitive consequences of the violation. The per se rule narrows the range of pertinent issues in an antitrust case, thereby reducing the burden of establishing liability. But "[b]oth *per se* rules and the Rule of Reason are employed 'to form a judgment about the competitive significance of the restraint.' * * * Indeed, there is often no bright line separating *per se* from Rule of Reason analysis." *NCAA* v. *Board of Regents,* 468 U.S. 85, 103-104 & n.26 (1984). See also *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.,* 864 F.2d 1409, 1419 (7th Cir. 1989). Regardless of the alleged violation, the antitrust injury requirement serves the purpose of limiting recovery to injuries that "reflect the *anticompetitive* effect either of the violation or of anticompetitive acts made possible by

[9] The court of appeals suggested that nonpredatory price competition resulting from a vertical, maximum pricing-fixing agreement could be anticompetitive because "when firms conspire to fix low prices in order to drive out the competition, the long-term consequences may be higher prices and reduced service to customers." Pet. App. 19a. We believe that the observation has no relevance to a case in which the defendant never attained more than 17% of the relevant market. See Pet. App. 3b. In competitive markets, rival firms would prevent higher prices or reduced services from prevailing, to the extent that consumers desired lower prices or increased services.

the violation." *Brunswick,* 429 U.S. at 489 (emphasis added).

Any remaining doubt that a per se violation does not eliminate the need for distinct antitrust injury is swept away by *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp., supra.* In that case, the plaintiffs challenged a horizontal price fixing conspiracy, "perhaps the paradigm of an unreasonable restraint of trade." *NCAA* v. *Board of Regents,* 468 U.S. at 100. See *Arizona* v. *Maricopa County Medical Society,* 457 U.S. 332 (1982); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911). The Court, however, did not conclude on that basis alone that the plaintiffs could challenge an alleged conspiracy among their rivals to set low prices.[10] Instead, citing *Brunswick,* the Court stated that the plaintiffs "must show that the conspiracy caused them an injury for which the antitrust laws provide relief" and that such a "showing depends in turn on proof that [the defendants] conspired to price predatorily * * *." 475 U.S. at 484 n.7.[11] The Court thus

[10] The Court stated that plaintiffs "must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. * * * Except for the alleged conspiracy to monopolize the American market through predatory pricing, these alleged conspiracies could not have caused [plaintiffs] to suffer an 'antitrust injury.' " 475 U.S. at 586.

[11] Similarly, the Court explained that horizontal price fixing that raises prices above a competitive level, though unquestionably illegal, could not possibly work *antitrust* injury to a competitor: "Nor can respondents recover damages for any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act * * *, but it could not injure respondents: as petitioner's competitors, respondents stand to gain from any conspiracy to raise the market price * * *. Cf. *Brunswick.*" 475 U.S. at 582-583. Under the reasoning of the court of appeals, however, the conclusion that prices were fixed, even if raised,

insisted that competitor-plaintiffs demonstrate not only that they were injured by their rivals' alleged per se violation, but also that the injury reflects an anticompetitive effect of the violation. This principle cannot be reconciled with the holding of the court of appeals in this case that any competitor experiencing dislocation as a result of a per se violation thereby establishes antitrust injury.

B. The Antitrust Laws Do Not Protect Competitors From Nonpredatory Pricing By Rivals

Under *Brunswick, Cargill,* and *Matsushita,* the critical question with respect to the antitrust injury requirement is whether respondent's losses from the lower but nonpredatory prices "occurred 'by reason of' that which" made the alleged vertical maximum price-fixing agreement unlawful. *Brunswick,* 429 U.S. at 488. Unfortunately, the court of appeals' "generic illegal price fixing analysis" (Pet. App. 39a (Alarcon, J., dissenting)) made it unnecessary for the majority to consider carefully the rationale for the per se prohibition of vertical, maximum price-fixing agreements. Properly analyzed, that prohibition is not intended to protect rival dealers from nonpredatory price competition.

1. Price fixing agreements differ in their purpose, operation, and effect. Thus, while all naked price fixing agreements are unlawful, they are not unlawful for the same reason. The classic price-fixing agreement is a minimum price fixing conspiracy among competitors. The Sherman Act condemns such agreements without regard to the reasonableness of the prices fixed. See *Catalano, Inc.* v. *Target Sales, Inc.,* 446 U.S. 643 (1980) (per curiam); *United States* v. *Trenton Potteries Co.,* 273 U.S.

would be sufficient to open the door to a showing of antitrust injury, because price fixing of any variety "disrupts" the market. See Pet. App. 13a.

392 (1927). These agreements are deemed unlawful, not because of any abstract concern about "disrupting" markets, but because they directly reduce consumer welfare, which is the central concern of the antitrust laws. See, *e.g.*, *Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 343 (1979). Minimum price-fixing agreements among competitors are deemed illegal per se because their effect is to raise prices and reduce output to the detriment of consumers.[12]

Other types of agreements affecting price, however, present different threats to consumer welfare. While vertical price fixing is illegal per se, the scope of the per se rule applicable to vertical price restraints has been carefully focused in order to avoid chilling potentially procompetitive nonprice vertical restraints. *Business Electronics Corp.* v. *Sharp Electronics Corp.,* 108 S. Ct. 1515, 1520 (1988); *Monsanto Co.* v. *Spray-Rite Service Corp.,* 465 U.S. 752, 763 (1984). Vertical nonprice restraints limiting competition among a single supplier's dealers "ha[ve] real potential to stimulate interbrand competition" and thereby increase consumer welfare. See *Business Electronics,* 108 S. Ct. at 1519; *324 Liquor Corp.* v. *Duffy,* 479 U.S. 335, 341-342 (1987); *Monsanto, supra*; *Continental TV, Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36 (1977). Accordingly, all vertical restraints except price restraints are judged under the rule of reason rather than the per se rule.

Maximum price agreements also present a more tenuous threat to consumer welfare than minimum price agree-

[12] In referring throughout this brief to per se illegal price-fixing agreements, we mean only those agreements that do not involve integrative efficiencies. See *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.,* 441 U.S. 1 (1979) (concluding, in the particular circumstances before the Court, that an agreement among competitors involving price – a joint venture to market music performance licenses under "blanket licenses" – should be tested under the rule of reason).

ments. This Court has twice considered horizontal, maximum price-fixing agreements and concluded that they are "on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices." *Arizona* v. *Maricopa County Medical Society,* 457 U.S. 332, 348 (1982); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951).[13] Those decisions suggest two primary reasons for that conclusion. First, an agreement ostensibly setting maximum prices may operate in fact as a minimum price agreement if virtually all the participants charge the maximum price. *Maricopa County,* 457 U.S. at 348. Second, the Court has suggested that maximum price agreements may inhibit vigorous and effective competition by the parties bound, acting to "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Kiefer-Stewart,* 340 U.S. at 213.[14]

In only one decision has the Court explicitly confronted a *vertical,* maximum price-fixing arrangement. In *Albrecht* v. *Herald Co.,* 390 U.S. 145 (1968), a newspaper distributor sought to charge his customers more than the suggested retail price advertised by the publisher, and, after the publisher attempted to discipline the distributor by hiring other persons to take away his customers, the distributor brought suit under Section 1 of the Sherman Act. The Court held that the vertical, maximum price-fixing arrangement before it was unlawful per se. The Court acknowledged that "[m]aximum and minimum price fixing may have different consequences in many situations." But the Court reiterated the view expressed in *Kiefer-Stewart* that any agreement on price " 'cripple[s] the freedom of traders.' " 390 U.S. at 152.

The Court then explained the ways in which a vertical agreement fixing maximum prices may inhibit vigorous competition by the dealers bound by it. The Court noted that a maximum price-fixing scheme, "by substituting the perhaps erroneous judgment of a seller for the force of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market." 390 U.S. at 152. "Maximum prices," the Court explained, "may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumers or to furnish services and conveniences which consumers desire and for which they are willing to pay." *Id.* at 152-153. And, by limiting the ability of smaller dealers to engage in nonprice competition, a maximum price-fixing agreement might "channel distribution through a few large or specifically advantaged dealers." *Id.* at 153. Finally, the Court observed that a maximum price-fixing agreement may "tend[ ] to acquire all the attributes of an arrangement fixing minimum prices." *Id.* at 153 & n.9.

2. Respondent's alleged injury does not reflect any of the potential threats to competition described by the Court. Respondent's losses flow from nonpredatory price

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[13] Although the restraint in *Keifer-Stewart* also operated to fix prices vertically, see *Maricopa County,* 457 U.S. at 348 n.18 (characterizing restraint in *Keifer-Stewart* as both horizontal and vertical), the agreement that was actually challenged, and that the Court reviewed, was between two suppliers that had agreed to sell liquor only to wholesalers who would adhere to "maximim prices above which the wholesalers could not resell." 340 U.S. at 212. Under then-applicable precedent, the suppliers were deemed horizontal competitors. *Id.* at 231. Under current law, however, because the suppliers were both wholly-owned by the same company, they would be deemed incapable of conspiring under Section 1 of the Sherman Act. See *Copperweld Corp.* v. *Independence Tube Corp.,* 467 U.S. 752 (1984).

[14] Thus, in *Maricopa County,* the Court observed that the maximum price-fixing agreement among competing physicians could remove the incentive to vigorous competition by preventing those with greater skill, experience, training, or willingness to innovate from reaping commensurate rewards. 457 U.S. at 348.

competition with firms assumed to have a vertical, maximum price-fixing agreement. But the Court in *Albrecht* did not discuss, as a policy consideration supporting the application of the per se rule to vertical, maximum price-fixing, the effect of that practice on competitors. Rather, the Court's focus was on protecting dealers in the particular product that is the subject of the maximum price fixing agreement.

Respondent, of course, did not experience any of those kinds of anticompetitive effects. For example, if the vertical agreement fixes "[m]aximum prices * * * too low for the dealer [in the product] to furnish services" desired by consumers, or in such a way as to channel business to large or well-situated distributors, *Albrecht,* 390 U.S. at 152-153, a competitor dealing in other brands would not be harmed. Indeed, a competitor might benefit since it would be free to offer the services consumers desire and for which they are willing to pay. And if the maximum price agreement "acquire[s] all the attributes of an arrangement fixing minimum prices," *id.* at 153, respondent would not suffer antitrust injury because a competitor "may not complain of conspiracies that * * * set minimum prices at *any* level." *Matsushita,* 475 U.S. at 583-585 n.8.

Indeed, respondent's alleged injury is indistinguishable from the effect of the vigorous competition that the antitrust laws are designed to promote. As the Court explained in *Cargill* and *Matsushita,* the only price competition that threatens both competitors and competition is predatory pricing. When prices do not fall below a level viewed as "predatory," a competitor faces only the rigors of marketplace competition, and succeeds or fails on the basis of the efficiency and quality of its business. Because "cutting prices in order to increase business often is the very essence of competition," *Matsushita,* 475 U.S. at 594, the lowering of prices to a nonpredatory level cannot cause an injury to

competitors that the antitrust laws are designed to prevent. See *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.,* 864 F.2d 1409, 1419 (7th Cir. 1989). See also P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 334.2c, at 306 (1988) ("protecting high price suppliers against lower priced competition desired by consumers is not an injury that the antitrust laws are designed to prevent, nor does it flow from the rationale for condemning maximum price fixing"); Page, *The Scope of Liability for Antitrust Violations,* 37 Stan. L. Rev. 1445, 1469-1470 (1985).

There is no need to dilute the antitrust injury requirement as applied to competitors in order to encourage private enforcement of the rule against vertical, maximum price fixing. If a vertical, maximum price-fixing scheme does cause the anticompetitive consequences described in *Albrecht,* the manufacturer's own dealers will suffer. Those dealers would furnish an adequate pool of plaintiffs. Cf. *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters,* 459 U.S. at 542 ("existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party * * * to perform the office of a private attorney general").[15]

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[15] In *Jack Walters & Sons Corp.* v. *Morton Building, Inc.,* 737 F.2d 698, 708-709 (7th Cir.), cert. denied, 469 U.S. 1018 (1984), the court of appeals held that a terminated dealer did not experience antitrust injury from a vertical, maximum price-fixing scheme. The court reasoned that "the only harm to [the terminated dealer] came from the fact that competing dealers (or [the supplier] itself) would lower their prices to consumers if the [terminated dealer] did not." 737 F.2d at 709. We do not agree with the implication of the court in *Jack Walters* that terminated or coerced dealers could never sue. In a particular case, we believe that a dealer could be injured by its supplier's maximum price-fixing scheme in a way that implicates the concerns iden-

Finally, recognizing antitrust injury when a competitor faces nonpredatory price competition may have the undesirable effect of discouraging perfectly legitimate arrangements between a supplier and its dealers. A competitor has an incentive to sue its rivals only when a vertical restraint has actually increased interbrand competition. But such enhanced competition may well be the fruit of lawful, nonprice, vertical restraints. Finding antitrust injury in cases such as this will encourage competitors to cast their challenges to potentially procompetitive nonprice, vertical restraints in a per se price-fixing mold. The litigation costs of such competitor suits could seriously undermine the Court's efforts to "assure that the market-freeing effect of [rule of reason analysis of nonprice vertical restraints] is not frustrated by related legal rules." *Business Electronics*, 108 S. Ct. at 1520.[16]

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tified by the Court in *Albrecht*, 390 U.S. at 152-153. In a proper case, therefore, we believe that a coerced or terminated dealer could establish antitrust injury.

[16] Respondent contends that it should be permitted to prove that the prices charged by petitioner's dealers were predatory, even if this Court holds that losses attributable to nonpredatory price competition flowing from a vertical, maximum price-fixing agreement do not constitute antitrust injury. Br. in Opp. 14-15. The district court concluded that respondent would be unable to demonstrate that petitioner engaged in predatory pricing, primarily because of Arco's relatively small share "of the retail gasoline market in California and Washington" (Pet. App. 3b) and its inability to forestall competition from other major oil companies if it attempted to raise prices after driving out independent competitors. *Ibid.* Cf. *Cargill*, 479 U.S. at 119-120 n.15 ("With only a 28.4% share of market capacity and lacking a plan to collude, Excel would harm only itself by embarking on a sustained campaign of predatory pricing. Courts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme."). Respondent did not directly challenge the district court's finding in the court of appeals, and that court had no occasion to address the issue given its view that *any* injury respondent suffered as a result of the alleged conspiracy was antitrust injury.

We note that formulation of the appropriate measure of cost for purposes of defining predatory pricing is a difficult issue, on which this Court has not previously had occasion to rule. See *Matsushita*, 475 U.S. at 584-585 n.8; *Cargill*, 479 U.S. at 117 n.12. As discussed above, however, the question raised in the petition is expressly limited to whether antitrust injury can flow from nonpredatory prices. In our view, the court of appeals should resolve in the first instance the questions whether respondent has preserved its right to challenge the district court's conclusion about predatory pricing and, if so, whether the district court's determination was erroneous. Cf. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 24-25 & n.44 (1979) (remanding in similar circumstances).

CONCLUSION

The decision of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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